IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13345 of 2003
with
CIVIL APPLICATION No 8507 of 2003
with
CIVIL APPLICATION No 7711 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

TEXTILE TRADERS CO OP BANK LTD

Versus

P.K.THAKKER CONSTRUCTION PVT.LTD.

Appearance:

1. Special Civil Application No. 13345 of 2003

MR PK JANI with MR G S THAKKAR for Petitioner No. 1

MR PRAFUL N THAKKAR for Respondent No. 1-4

MR NANDLAL THAKKAR for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH

Date of decision: 18/12/2003

ORAL JUDGEMENT

Rule. Mr NR Thakkar for the respondents waives service of Rule.

In the facts and circumstances of the case, the

petition is taken up for final disposal today.

2. This petition is directed against a part of the order dated 29.8.2003 (Annexure "J") passed by the Gujarat State Co-operative Tribunal (hereinafter referred to as "the Tribunal") in revision application No. 196 of 2003 arising from the order dated 30.4.2003 passed by the Board of Nominees at Ahmedabad rejecting the respondent-defendants' application Exh.15 in Summary Lavad Suit No. 985 of 2003.

3. The petitioner-bank has filed the above numbered suit before the Board of Nominees for recovering its dues to the tune of Rs.42 lakhs and odd amount. The petitioner-bank had advanced term loans of Rs.20 lakhs and cash credit hypothecation loan of Rs.5 lakhs in the year 1997. The suit was filed on 20.3.2003 and upon service of summons, the respondent-defendants appeared and on 9.4.2003, the defendants filed application Exh. 15 for raising a preliminary issue whether the suit was maintainable against the defendants in as much as the defendants were not members of the petitioner-bank (which is a co-operative society) when the documents were executed by the defendants in favour of the petitioner-bank.

4. The Board of Nominees by its order dated 30.4.2003 (Annexure "F") rejected the said application after referring to the following facts :-

The defendants had submitted applications for being enrolled as members of the petitioner-bank and also for obtaining loans on 26.12.1996 or 30.12.1996. The loan was to be obtained by defendant No.1 and defendant Nos. 2, 3 and 4 were to be guarantors. The Board of Directors sanctioned the loan application on 21.1.1997. The documents for the loan as well as for the guarantee were executed by the respondent-defendants on 25.1.1997. Thereafter, the Board of Directors passed Resolution No.2 on 26.2.1997 accepting the applications of the respondent-defendants for membership. Thereafter, the petitioner-bank made disbursement of the term loan of Rs.10 lakhs to defendant No. 1 on 26.3.1997 and another term loan of Rs.5 lakhs was given to defendant No.1 on 24.4.1997 and the third term loan of Rs.5 lakhs was given to defendant No.1 on 13.5.1997. In all, term loans of Rs.20 lakhs were disbursed to defendant No.1 between 26.3.1997 and 13.5.1997. As far as the cash credit hypothecation account is concerned, the first disbursement was made before 26.2.1997, but all subsequent withdrawals were after 26.2.1997. Since the

cash credit hypothecation account was initially sanctioned for only one year, defendant No.1 applied for renewal of cash credit hypothecation account on 21.3.1998 which was sanctioned by the petitioner-bank. Since defendant No.1 made defaults in payments, the petitioner-bank instituted the above numbered suit on 20.3.2003.

The controversy about maintainability of the suit has been raised by the defendants on the ground that the defendants were not members of the petitioner-co-operative society when the defendants executed the documents in favour of the petitioner-society. The Board of Nominees held that the relevant date for examining whether the defendants were members or not was the date on which the transactions took place i.e. the dates on which the petitioner-bank disbursed the amounts to the defendants by way of loan/s. On that basis, the Board of Nominees held that the term loan amounts were disbursed to defendant No.1 from 26.3.1997 onwards i.e. after the defendants were enrolled as members on 26.2.1997. As regards the cash credit hypothecation account, the defendants gave the application for renewal on 23.1.1998 and prior to that date they had already become members. In this view of the matter, the Board of Nominees held that the defendants were members of the petitioner-society and, therefore, the suit was maintainable under Section 96(1)(b) of the Gujarat Co-operative Societies Act, 1961 (hereinafter referred to as "the Act").

5. Aggrieved by the above order, the defendants carried the matter in revision before the Tribunal. When the stay application filed by the defendants in the revision application came up for hearing, after hearing the parties, the Tribunal dismissed the stay application by order dated 17.6.2003 (Annexure "H"). In the said interim order also, the Tribunal referred to the findings of fact given by the Board of Nominees as to when the documents were executed by the defendants, the date of enrolment and the date of disbursement. Against the said order of the Tribunal rejecting the interim stay application, the defendants preferred Special Civil Application No. 6992 of 2003 which came to be dismissed by this Court by order dated 23.6.2003 (Annexure "I") wherein the Court made, inter alia, the following observations :-

"On going through the order passed by the Tribunal, there is no dispute about the fact that the revision application is still pending before

> the Tribunal and the Tribunal has given clear, cogent and convincing reasons for refusing to grant interim relief. ... ... While going through the order passed by the Tribunal, the Court is of the view that after discussing the issues raised before it, the Tribunal has taken the view which any prudent person can take, qua the interim relief is concerned. Other aspects which are raised in the revision application can be gone into at the time when the revision application is decided. I am however of the view that the very issue as to when the petitioners can be said to be members, either at the time when the application was made, membership was granted, the loan was sanctioned, or when the amount was actually withdrawn, can be looked into when the matter is finally disposed of."

After making the aforesaid observations and after observing that the discretion exercised by the Tribunal in the present case cannot be said to be capricious or perverse or ultra vires, the Court dismissed the Special Civil Application.

6. When the revision application came to be finally heard, the Tribunal referred to the facts already brought on record through documentary evidence being the applications made by the defendants for membership, the date of enrollment, the date on which the documents were executed and the dates on which the loans were disbursed. After considering those documents, the Tribunal came to the following conclusions :-

"The defendants had submitted applications on
> 26.12.1996 or 30.12.1996 for becoming members of the petitioner-cooperative society and they were enrolled as members by the petitioner on 26.2.1997. The bank sanctioned the term loan papers on 21.1.1997 and the defendants executed the documents on 25.1.1997. The defendants were enrolled as members on 26.2.1997. The bank for the first time disbursed the loan of Rs.10 lakhs on 26.3.1997."

After referring to the aforesaid facts, the Tribunal relied on its decision dated 31.3.2003 in Appeal No. 200 of 1999 taking the view that the relevant date for considering whether the defendants were members of the plaintiff-cooperative society is the date on which the loan transaction took place. In the said decision, the Tribunal has also taken the view that when the

application for membership is given by the applicants alongwith other documents for loan, merely because the administrative procedure regarding the application for membership is not completed, it cannot be said that the loan documents executed by the defendants were not in their capacity as members of the society when the membership was ultimately granted after execution of the documents but before disbursement of the loans.

After referring to the aforesaid factual data and the aforesaid view which the Tribunal had taken in some other cases, the Tribunal concluded that -

"considering the above facts, circumstances and order of the learned Nominee, it is clear that the learned Nominee has passed the said order after considering all aspects of the case papers and arguments of both the learned advocates and order passed by the learned Nominees is just and proper and hence, we do not find it just and proper to interfere with the order passed by the learned Nominee."

Thereafter the Tribunal further observed as under:-

"However, learned Nominee is directed to decide the issue of membership as it involves mixed question of law and fact by taking evidence of both the parties in (sic - at) trial."

Then the Tribunal passed the following operative order :-

"Revision Application No. 196/03 is dismissed. The order of the learned Nominee below Ex.15 in summary lave suit No.985/03 dated 30/4/03 is confirmed. However, the applicants are directed to file their Leave to Defend Application on or before 10/9/2003. The learned Nominee is directed to decide the issue of membership as it involves mixed question of law and fact by taking evidence of both the parties in (sic - at) trial, and proceed in the matter according to law and decide the same on merits. No order as to cost."

(underlining supplied)

The plaintiff-bank has filed the present petition against the aforesaid underlined observations made and the direction given by the Tribunal regarding the issue

of membership.

While issuing notice on 9.9.2003, this Court had granted the following ad-interim stay :-

> "Notice returnable on 23.9.2003. By way of ad-interim order, it is directed that the operative portion of the order dated 29.8.2003 passed by the Gujarat State Co-operative Tribunal in Revision Application No.196/2003, so far as it relates to ordering that "the learned Nominee is directed to decide the issue of membership as it involves mixed question of law and fact by taking evidence of both the parties in the trial" shall remain stayed."

There is some controversy whether the ad-interim relief continued to operate or stood vacated in view of Civil application No. 7711 of 2003 filed by the defendants under Article 226(3) of the Constitution. The petitioner-bank has filed Civil Application No. 8507 of 2003 for continuing the ad-interim relief. It is, however, not necessary to go into that controversy as the main petition itself is heard and is being disposed of today.

7. At the hearing of this petition, Mr PK Jani with Mr GS Thakkar, learned counsel for the petitioner-bank have submitted that once the Tribunal confirmed the order of the Board of Nominees that the defendants were members of the petitioner-bank and, therefore, the suits were maintainable, the Tribunal was not required to again direct the Board of Nominees to decide the issue of membership by taking evidence of both the parties.

In the alternative, it is submitted that even if the Tribunal was justified in giving such a direction, all that the direction means is that as and when the suit is to be finally tried i.e. when the evidence is led at the trial, only at that point of time the issue of membership is to be considered while finally disposing of the suit on the basis of evidence which is to be led at the trial. But in the instant case, relying on the aforesaid underlined observations made by the Tribunal, the defendants have submitted application Exh.74 on 25.11.2003 by which the defendants have again prayed before the Board of Nominees to require the parties to lead evidence on the issue of membership of the defendants. It is submitted by Mr Jani that once the Board of Nominees as well as the Tribunal had expressed

their view about membership of the defendant and maintainability of the suits, there was no question of giving another round to the defendants to raise the same controversy. Atleast till the suit is finally heard and decided, the Board of Nominees is required to proceed on the basis that the defendants were members of the petitioner-bank on the date of transactions and the suits are maintainable. The learned counsel for the petitioner have also invited the attention of the Court to the documents on record of this petition.

8. On the other hand, Mr NR Thakkar for the respondents has vehemently opposed the petition and has submitted that the petitioner-bank may either accept the order of the Tribunal as it is or the entire order must go, but the petitioner-bank cannot be permitted to enjoy the first part of the operative order and challenge the second part of the operative order.

It is further submitted that the scope of jurisdiction of this Court under Article 226 or 227 of the Constitution is very limited and all that the Tribunal has done in the case is to direct the Board of Nominees to decide the issue of membership after taking evidence of both the parties as it is a mixed question of law and fact and, therefore, no fault can be found with the said direction of the Tribunal.

On merits, it is submitted that the defendants were admittedly not enrolled as members of the petitioner-bank as on the date of execution of the documents i.e. on 25.1.1997 and the date of execution of the documents being the only relevant date, the defendants having been enrolled as members of the petitioner-bank only on 26.2.1997, the defendants were not members of the petitioner-bank on the date of the transactions and, therefore, the suits were filed against persons who were not members and, therefore, covered by provisions of Section 96(1)(c) of the Act which clause has been struck down by this Court in 12 GLR 355.

Mr Thakkar has relied on the following decisions:-

(i) Shishirkumar Sharadchandra Sen vs. Bina Ashwinkumar Bhaumik, 1991 (1) GLR 195.

(ii) Hashmukhlal vs. Ishwarlal, 1986 (1) GLR 257

(iii) Ayyaswami Gounder vs. Munnuswamy

Gounder, AIR 1984 SC 1789

(iv) 2000(4) GLR 3408

Mr Thakkar has also referred to a number of decisions of the Tribunal on the controversy about membership.

9. Having heard the learned counsel for the parties, it appears to the Court that the Board of Nominees as well as the Tribunal have given findings on application Exh.15 and rejected the same in view of the fact that both the Board of Nominees and the Tribunal have considered the date of disbursement as the date of transaction. The defendants had submitted applications for membership/s as well as for loans on 26th or 30th December 1996, the loans were sanctioned on 21st January 1997 and thereafter the documents were executed on 25th January 1997 and the defendants' applications dated 26/30.12.1996 for membership were granted by the Board of Directors on 26th February 1997 and thereafter disbursements were made for the term loans of Rs.20 lakhs. It is thus clear that both the Board of Nominees and the Tribunal have come to the conclusion that the date of disbursement being the relevant date, the defendants were members on the date of transactions and, therefore, the suit was maintainable. It appears, however, that the Tribunal was of the view that since the question of membership is a mixed question of law and fact, ultimately when the trial takes place, it would be open to the parties to lead evidence on the question of membership as well and thereupon the Board of Nominees would decide all the questions finally on the basis of the evidence to be led at the trial. In para 8, while concluding the discussion also, the Tribunal has used the expression "taking evidence of both the parties in (sic at) trial" and also in the operative order, the Tribunal has taken pains to use the expression "taking evidence of both the parties in (sic at) trial". It is, therefore, clear that the Tribunal was quite conscious of the fact that the Board of Nominees as well as the Tribunal had taken prima facie view on the question of membership and, therefore, that view was to prevail till the evidence is led at the trial and the Board of Nominees finally examines all the questions including the question of membership.

10. Section 45 of the Gujarat Co-operative Societies Act, 1961 reads as under :-

"45. Restrictions on making loans.- (1) No society shall make a loan to any person other than a member, or on the security of its own shares, or on the security of any person who is not a member :

Provided that, with the special sanction of the Registrar, a society may make loans to another society.

(2) Notwithstanding anything contained in sub-section (1), a society may make a loan to a depositor on the security of his deposit."

A bare reading of the aforesaid Section would also indicate that a co-operative bank can advance loans only to its members. It is, therefore, obvious that making an application for membership by a prospective loanee would always precede the co-operative bank making a loan to such an applicant and, therefore, when the Board of Directors accepts the membership application and enrols the applicant as a member of the co-operative society doing banking business, it is possible to construe the resolution enrolling the member as relating back to the date on which the membership application was submitted by the prospective loanee. It is, however, not necessary to pursue this question further as this Court is inclined to agree with the view of the Board of Nominees as well as the Tribunal that the defendants were the members of the petitioner-bank when the transaction giving rise to the suit took place, that is when the disbursements were made.

11. Mr Thakkar has submitted that even if the suit is maintainable against defendant No.1 as per the reasoning given by the Board of Nominees and the Tribunal, in any view of the matter, that finding cannot operate against defendant Nos. 2 to 4 the guarantors who had no transaction with the petitioner-bank after execution of the documents on 25.1.1997 and after their enrollment as members on 26.2.1997. It is, therefore, submitted that defendant Nos. 2 to 4 stand on a different footing than defendant No.1.

12. It is required to be noted that application Exh.15 was filed by all the defendants and upon rejection of the said application, all the defendants filed revision application No. 196 of 2003. The Tribunal has dismissed the revision application without considering any distinction between the case of defendant No.1 and defendant Nos. 2 to 4. The defendants have not

challenged the said order dated 29.8.2003 of the Tribunal. Hence, it is really not necessary to go into the contention sought to be raised by the learned counsel for the defendants at this stage. However, since Mr NR Thakkar for the respondent-defendants has asked for a ruling, the Court has considered the documents executed by defendant No.1 and also the documents executed by defendant Nos. 2 to 4 including the letter of guarantee. In this connection, it is necessary to refer to the sanction letter dated 21.1.1997 of the petitioner-bank by which defendant No.1 was informed that defendant No.1 was required to give personal guarantees of Praful Nandlal Thakkar (defendant No.2) and Kamlesh Nandlal Thakkar (defendant No.3) and also additional personal guarantee of Nandlal Ramanlal Thakkar (defendant No.4) and that they will have to become nominal members of the bank. The terms of loan at the back of the said document include term No. 6 which states that "for the above sanctioned banking facility, defendant No. 1 will have to give guarantee and the guarantors will have to become members of the bank". It thus appears that the sanction of the loan by order dated 21.1.1997 was conditional upon defendant No.1 furnishing personal guarantee of defendant Nos. 2, 3 and 4 and defendant Nos. 2, 3 and 4 becoming nominal members of the petitioner-bank. It, therefore, appears that the applications for enrolment of membership, and for loans made on 26/30.12.1996, sanction of loan on 21.1.1997, execution of documents on 25.1.1997 and subsequent disbursements were a part of the same transaction touching the business of the petitioner-bank i.e. the banking business of the petitioner-cooperative society. In this view of the matter, the decision of the Apex Court in D.M. Co-op. Bank vs. Dalichand, AIR 1969 SC 1320 will apply wherein the Apex Court observed that once it is held that the original transaction was entered into by the member with the society as a member then any person who claims rights or title through that member must come within the provisions of Section 91(1)(b) of the Maharashtra Co-operative Societies Act, 1961 which is analogous to the provisions of Section 96(1)(b) of the Gujarat Act.

Both the Board of Nominees and the Tribunal have taken the view that the date of disbursement would be the relevant date for considering whether the defendants were members of the petitioner-society on the date of transaction. This Court finds no reason to discard that view.

13. As regards the contention that the guarantors have no transaction with the petitioner-bank after

25.1.1997 or after 26.2.1997, the submission proceeds on the assumption that the liability of the guarantors arises upon execution of the documents which would be an obvious misconception. The liability would arise only upon disbursement of the loan in favour of the principal borrower and default being committed by the borrower in payment. Until the loan is disbursed to the principal borrower, there cannot be any question of guarantor incurring any liability to pay. Hence, in so far as the guarantors are concerned, for them also the date of transaction would be the date of disbursement of the loan to the borrower. In this view of the matter also, there is no substance in the contention that defendant Nos. 2 to 4 stand on a different footing from defendant No.1.

14. It appears that the observations/direction are being utilized by the defendants to delay the hearing of leave to defend application in the Summary Suit pending before the Board of Nominees by giving another application Exh.74 which is similar to application Exh.15 which is already dismissed by the Board of Nominees and which order is confirmed by the Tribunal.

15. None of the authorities cited by Mr Thakkar deals with the controversy raised in this petition and, therefore, it is not necessary to deal with the same.

16. In view of the above discussion, the petition is allowed. The following observations in the order dated 29.8.2003 (Annexure "J") passed by the Gujarat State Co-operative Tribunal in revision application No. 196 of 2003 are deleted :-

> "The learned Nominee is directed to decide the issue of membership as it involves mixed question of law and fact by taking evidence of both the parties in trial, and proceed in the matter according to law and decide the same on merits."

Accordingly, the Board of Nominees shall proceed with the Summary Lavad Suit at the stage at which it was lying when the Board of Nominees dismissed application Exh.15.

Rule is made absolute to the aforesaid extent with no order as to costs.

17. At this stage, Mr Thakkar for the respondent-defendants prays that operation of this judgment may be stayed for some time to enable the defendants to have further recourse in accordance with

law.

Since there are concurrent findings given by three Courts i.e. the Board of Nominees, Tribunal and this Court on the question about maintainability of the suit, there is no warrant for staying the operation of this order.

18. Mr Thakkar presses his Civil Application No. 7711 of 2003 which was filed for vacating the ad-interim stay dated 9.9.2003 and wants to address the Court.

Since the Court has allowed the main petition and made the Rule absolute by deleting the observations in question from the operative order of the Tribunal, there is no question of considering either the Civil Application filed by the defendants for vacating the ad-interim stay or the Civil Application of the petitioner-Bank for extension of stay and the Court has, therefore, not permitted Mr Thakkar to argue any Civil Application for the simple reason that both the Civil Applications have become infructuous in view of the order passed in the main petition.

19. Since the main petition itself is allowed and the observations in question made by the Tribunal have been ordered to be deleted, both the Civil Applications would not survive and the same are accordingly disposed of.

(M.S. Shah, J.)

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